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5 IN THE UNITED STATES DISTRICT COURT  
6 FOR THE EASTERN DISTRICT OF CALIFORNIA

7 UNITED STATES OF AMERICA,

8 Respondent, No. 2:02-cr-0416 GEB JFM (HC)

9 vs.

10 DAWANE ARTHUR MALLETT,

11 Movant. FINDINGS AND RECOMMENDATIONS

12 \_\_\_\_\_ /  
13 Movant is a federal prisoner proceeding pro se with a motion to vacate, set aside,  
14 or correct his sentence pursuant to 28 U.S.C. § 2255. Movant challenges his 2003 conviction on  
15 multiple federal criminal charges and the sentence imposed thereon. This matter is before the  
16 court on respondent's motion to dismiss the action as barred by the statute of limitations  
17 contained in 28 U.S.C. § 2255.<sup>1</sup>

18 Section 2255 provides in relevant part that a one year statute of limitations applies  
19 to § 2255 motions. The limitations period runs "from the latest of –

20 (1) the date on which the judgment of conviction  
21 becomes final;  
22 (2) the date on which the impediment to making a  
23 motion created by governmental action in violation of the  
Constitution or laws of the United States is removed, if the

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25 <sup>1</sup> On June 18, 2008, the Clerk of the Court issued a notice setting a briefing schedule for  
26 respondent's motion in accordance with the provisions of Local Rule 78-230(m). Pursuant to  
that notice, movant's opposition to respondent's motion was due on July 9, 2008. Movant has  
not filed an opposition to the motion or otherwise responded either to the motion or to the notice  
setting the briefing schedule.

1 movant was prevented from making a motion by such  
2 governmental action;

3 (3) the date on which the right asserted was initially  
4 recognized by the Supreme Court, if that right has been  
5 newly recognized by the Supreme Court and made  
6 retroactively applicable to cases on collateral review; or

7 (4) the date on which the facts supporting the claim or  
8 claims presented could have been discovered through the  
9 exercise of due diligence.

10 28 U.S.C. § 2255.

11 It appears from review of the motion that the limitations period began to run  
12 against movant when his judgment of conviction became final.<sup>2</sup>

13 The Supreme Court has held that a conviction is final in the  
14 context of habeas review when “a judgment of conviction has been  
15 rendered, the availability of appeal exhausted, and the time for a  
16 petition for certiorari elapsed or a petition for certiorari finally  
17 denied.” Griffith v. Kentucky, 479 U.S. 314, 321 n. 6, 107 S.Ct.  
18 708, 93 L.Ed.2d 649 (1987).

19 U.S. v. Schwartz, 274 F.3d 1220, 1223 (9<sup>th</sup> Cir. 2001). Movant’s direct appeal was denied on  
20 December 1, 2006.<sup>3</sup> Movant had ninety days thereafter to file a petition for writ of certiorari in  
21 the United States Supreme Court. Id. at 1223 n.2. Thus, the statute of limitations began to run  
22 against movant on or about March 3, 2007. As a general rule, documents filed by pro se  
23 prisoners are deemed filed on the day they are delivered to prison officials for mailing to the  
24 court. See Houston v. Lack, 487 U.S. 266, 270-72, 275 (1988). There is no evidence in the

25  
26 <sup>2</sup> As noted above, movant has not opposed respondent’s motion. Nothing in movant’s  
claims suggest that they are based on newly discovered information or new U.S. Supreme Court  
precedent, or that he was prevented by illegal governmental action from filing a timely motion.

<sup>3</sup> It is unclear from the record whether movant, who was represented by counsel on direct  
appeal, knew of the disposition of his appeal prior to the time he filed his § 2255 motion. In his  
motion, movant alleges that his appeal is “still pending”. § 2255 Motion, filed April 3, 2008, at  
2. In addition, movant’s fourth claim for relief is a claim of ineffective assistance of appellant  
counsel in which movant alleges, inter alia, that his appellate counsel failed to keep him aware of  
the status of his direct appeal. Id. at 5. However, movant has not opposed respondent’s motion  
and therefore has not relied on these or any other allegations to contend that the action is not  
time-barred.

1 record conclusively demonstrating when the motion was delivered to prison officials for mailing  
2 to the court. Movant signed his motion on March 27, 2008, approximately twenty-four days after  
3 the statute of limitations expired, and the motion was filed in this court on April 3, 2008, thirty-  
4 one days after expiration of the limitation period. The former date represents the earliest possible  
5 date on which movant's § 2255 motion could be deemed filed. Assuming arguendo that is the  
6 proper filing date, the motion is nonetheless untimely and must be dismissed.

7 Accordingly IT IS HEREBY RECOMMENDED that:

8 1. Respondent's June 16, 2008 motion to dismiss be granted;  
9 2. Movant's § 2255 motion be dismissed as barred by the statute of limitations;

10 and

11 3. The Clerk of the Court be directed to close the companion civil case No. 2:08-  
12 cv-0707 GEB JFM (HC).

13 These findings and recommendations are submitted to the United States District  
14 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty  
15 days after being served with these findings and recommendations, any party may file written  
16 objections with the court and serve a copy on all parties. Such a document should be captioned  
17 "Objections to Magistrate Judge's Findings and Recommendations." The parties are advised that  
18 failure to file objections within the specified time waives the right to appeal the District Court's  
19 order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

20 DATED: July 29, 2008.

21   
22 UNITED STATES MAGISTRATE JUDGE  
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